

01--2003-09-16--NLRB-Freedom-of-Information-Act-request	2
02--2003-10-20--NLRB-FOIA-correspondence	3
03--2004-03-15--NLRB-FOIA-correspondence	4
04--2004-04-16--NLRB-FOIA-correspondence	5
05--2004-04-30--NLRB-FOIA-correspondence	7
06--2004-05-11--NLRB-FOIA-response	9
07--2001-01-11--nlrb-foia-1-of-8-case-contacts	15
08--2001-01-15b--nlrb-foia-2-of-8-kumagai-statement	16
09--2000-12-04b--nlrb-foia-3-of-8-notice-to-aip	18
10--2000-12-06--nlrb-foia-4-of-8-aip-representation	20
11--2001-01-17--nlrb-foia-5-of-8-demand-for-evidence	21
12--2001-01-18--nlrb-foia-6-of-8-clarification-request	26
13--2001-01-19--nlrb-foia-7-of-8-clarifications	28
14--2001-02-02--nlrb-foia-8-of-8-aip-response	29

16 September 2003

Regional Director
National Labor Relations Board
Region 5
103 South Gay Street, 8th Floor
Baltimore, MD 21202-4061

Re: American Institute of Physics
Case 5-CA-29366

Dear Regional Director:

I am writing to request information on the case named above. I understand that the information I seek is available under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* I will pay your costs for producing the material.

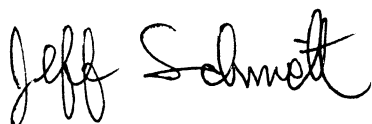
I would like the following information from your office, from the NLRB Washington, D.C., office, and from the office of the NLRB general counsel:

1. All letters, documents, notes, and other material related to this case, except for material submitted to the NLRB by Jeff Schmidt himself or by the law firm Dickstein Shapiro Morin & Oshinsky.
2. All handwritten and typewritten notes and other material written by NLRB staff members, except for letters addressed to or copied to Jeff Schmidt.
3. The FOIA file for this case, showing all requests for information about the case, except for this request.

Please note that this request includes, but is not limited to, all material submitted by the American Institute of Physics and its lawyers, and all material from third persons in support of either party.

Thank you for your help.

Sincerely,

A handwritten signature in black ink that reads "Jeff Schmidt". The signature is written in a cursive, flowing style.

**UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL**

FREEDOM OF INFORMATION OFFICE
Washington, D.C. 20570

DATE: October 20, 2003

Jeff Schmidt
3003 Van Ness Street, NW
Apt. W406
Washington, DC 20008

Dear Mr. Schmidt:

This is in response to your letter dated September 16, 2003, to the Regional Director, Region 5, transferred in part to this Office on September 30, 2003, in which you request, pursuant to the Freedom of Information Act (FOIA), various documents concerning Case 5-CA-29366 from the "office of the NLRB general counsel."

The Office of Appeals file in the above-referenced case was destroyed pursuant to that Office's practice of destroying its files approximately one year after the appeal is closed. However, the informal file in that case, maintained by the Agency's Case Records Unit, generally contains the same documents that were in the Office of Appeals file. The informal file for this case recently has been sent to the Federal Records Center and is not available at this time. In approximately four to six weeks you may renew your request for all releaseable documents from that file.

In addition, a search of this office's FOIA files revealed two requests for documents concerning the above-referenced case. I have enclosed the responsive documents.

The undersigned is responsible for the above determinations. You may obtain a review thereof under the provisions of § 102.117(c)(2)(ii) of the Board's Rules by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D.C. 20570, within 20 days (excluding Saturdays, Sundays and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Sincerely,


Jacqueline A. Young
Freedom of Information Officer
Telephone: (202) 273-3840

cc: Director, Region 5

Enclosure

DLB:kmb
schm.dlb.doc

15 March 2004

Jacqueline A. Young
Freedom of Information Officer
National Labor Relations Board
Office of the General Counsel
1099 14th Street NW
Washington, DC 20570

Re: American Institute of Physics
Case 5-CA-29366

Dear Ms. Young:

Thank you very much for your letter and enclosure of 20 October 2003 in response to my Freedom of Information Act request of 16 September 2003.

You explained that some of the information that I requested was unavailable at the time of my request, because it was being sent to the Federal Records Center. And you noted that I could renew my request after that transfer was completed. Thus, I am writing now to renew the request that I made on 16 September 2003. I will pay your costs for producing the requested material.

In my 16 September 2003 request, I asked for information from three NLRB offices: the Region 5 office in Baltimore; the Washington, D.C., office where the case originated; and the General Counsel's office. I received a response from only one of those offices; that was your letter of 20 October 2003. Does that mean that the other two offices had no relevant information?

I seek the following information:

1. All letters, documents, notes, and other material related to this case, except for material submitted to the NLRB by Jeff Schmidt himself or by the law firm Dickstein Shapiro Morin & Oshinsky.
2. All handwritten and typewritten notes and other material written by NLRB staff members, except for letters addressed to or copied to Jeff Schmidt.
3. The FOIA file for this case, showing all requests for information about the case made subsequent to my 16 September 2003 request, except for the present request.

Please note that this request includes, but is not limited to, all material submitted by the American Institute of Physics and its lawyers, and all material from third persons in support of either party.

Thank you for your help.

Sincerely,



**UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL**

FREEDOM OF INFORMATION OFFICE
Washington, D.C. 20570

DATE: April 16, 2004

Mr. Jeff Schmidt
3003 Van Ness Street, NW
Apt. #406
Washington, DC 20008

Dear Mr. Schmidt:

This is in response to your letter dated March 15, 2004, received in this Office on March 19, 2004, in which you request, pursuant to the Freedom of Information Act (FOIA), information concerning:

1. "All letters, documents, notes, and other material related to this case, except for material submitted to the NLRB by Jeff Schmidt himself or by the law firm Dickstein Shapiro Morein & Oshinsky.
2. All handwritten and typewritten notes and other material written by NLRB staff members, except for letters addressed to or copied to Jeff Schmidt.
3. The FOIA file for this case, showing all requests for information about the case made subsequent to my 16 September 2003 request, except for the present request."

With regard to items one and two of your request, we have ordered the file from the Federal Records Center and have not received it as of this date. Accordingly, the Agency will require another ten working days, until April 30, 2004 to respond to that part of your request.

Concerning item three of your request, a search of this Office's FOIA files revealed no documents responsive to your request.

The undersigned is responsible for the above determinations. You may obtain a review thereof under the provisions of § 102.117(c)(2)(v) of the Board's Rules by filing an appeal with the General Counsel, National Labor Relations

Board, Washington, D.C. 20570, within 20 days (excluding Saturdays, Sundays and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Sincerely,

A handwritten signature in cursive script that reads "Jacqueline A. Young".

Jacqueline A. Young
Freedom of Information Officer
Telephone: (202) 273-3840

DLB:kmb
jeff.dlb.doc

**UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL**

FREEDOM OF INFORMATION OFFICE
Washington, D.C. 20570

DATE: April 30, 2004

Mr. Jeff Schmidt
3003 Van Ness Street, NW
Apt. #406
Washington, DC 20008

Dear Mr. Schmidt:

This is in response to your letter dated March 15, 2004, received in this Office on March 19, 2004, in which you request, pursuant to the Freedom of Information Act (FOIA), information concerning:

1. "All letters, documents, notes, and other material related to this case, except for material submitted to the NLRB by Jeff Schmidt himself or by the law firm Dickstein Shapiro Morein & Oshinsky.
2. All handwritten and typewritten notes and other material written by NLRB staff members, except for letters addressed to or copied to Jeff Schmidt.
3. The FOIA file for this case, showing all requests for information about the case made subsequent to my 16 September 2003 request, except for the present request."

An interim reply which addressed item three of your request was sent to you on April 16, 2004.

Concerning items one and two of your request, I have been advised by Region 5 that the main investigatory file for this case is still in the Region and that they will fully respond to your request. The only document in the files from the Federal Records Center that would not be contained in the main investigatory file and that is responsive to your request is an internal memorandum which is privileged from disclosure pursuant to FOIA Exemption 5. 5 U.S.C. § 552(b)(5).

Agency Memoranda reflecting deliberative process are privileged from disclosure under FOIA Exemption 5, 5 U.S.C. § 552(b)(5), since they are intra-agency memoranda which would not be available by law to a party other than an agency in litigation with this Agency. The legislative history of Exemption 5 makes it clear that this subsection of the Freedom of Information Act was designed to protect and promote the objectives of fostering frank deliberation and

consultation within the Agency in the policy-making stage, and to prevent a premature disclosure of policy which could disrupt agency procedure. Thus, Exemption 5 is based upon and preserves the privilege against disclosure of intra-agency and inter-agency memoranda reflecting the deliberative and consultative process so that communications between those involved in the process might be uninhibited. FOIA Exemption 5 was intended to encompass all documents "normally privileged in the civil discovery process," *Sears*, 421 U.S. at 148-149 (1975); *FTC v. Grolier*, 462 U.S. 19, 20, 26 (1983); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); and it incorporates the attorney work product privilege. *Sears*, 421 U.S. at 154.

The undersigned is responsible for the above determinations. You may obtain a review thereof under the provisions of § 102.117(c)(2)(v) of the Board's Rules by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D.C. 20570, within 20 days (excluding Saturdays, Sundays, and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Sincerely,


Jacqueline A. Young
Freedom of Information Officer
Telephone: (202) 273-3840

DLB:kmb
jeff.sch.dlb.doc



National Labor Relations Board

1099 14th Street, NW
Finance Branch - Rm 7830
Washington, DC 20005-3419
202-273-4230 fax 202-273-4273

Invoice No. 05-04-59

INVOICE

FOIA Requester

Name Jeff Schmidt
Address 3003 Van Ness Street, NW, Apt. W406
City Washington State DC ZIP 20008
Phone _____

Date 5/11/04

Description	TOTAL
IN RESPONSE TO YOUR LETTER DATED 9/16/03.	\$120.44
TOTAL	\$120.44

Payment Instructions

Make check payable to National Labor Relations Board.
Include invoice number on check or send a copy of this
invoice with the payment to the address shown on the top of
the invoice.



United States Government
NATIONAL LABOR RELATIONS BOARD
Region 5
103 South Gay Street, 8th Floor
Baltimore, MD 21202-4061

Telephone: (410) 962-2822
Facsimile: (410) 962-2198

May 11, 2004

Mr. Jeff Schmidt
3003 Van Ness Street, N.W.
Apt. W406
Washington, D.C. 20008

Re: Freedom of Information Act Request

Dear Mr. Schmidt:

This acknowledges receipt of your letter requesting certain information under the Freedom of Information Act (FOIA). You requested the following information:

1. All letters, documents, notes, and other material related to this case, except for material submitted to the NLRB by Jeff Schmidt himself or by the law firm Dickstein Shapiro Morin & Oshinsky.
2. All handwritten and typewritten notes and other material written by NLRB staff members, except for letters addressed to or copied to Jeff Schmidt.
3. The FOIA file for this case, showing all requests for information about the case, except for this request.
4. [T]his request includes, but is not limited to, all material submitted by the American Institute of Physics and its lawyers, and all material from third persons in support of either party.

You requested "information from [our] office, from the NLRB Washington, D.C., office and from the office of the NLRB general counsel." As you know, your request previously was forwarded to the NLRB's Freedom of Information Officer, in Washington, Jacqueline A. Young.

After a complete search and review of the responsive documents, the undersigned has determined that the documents you have requested are, in part, privileged from disclosure under FOIA Exemptions 5, 6, and 7(C), 5 U.S.C. 552(b)(5)(6)(7)(C). Therefore, your request is denied, in part.

The file in case 5-CA-29366 contains routine administrative material, such as NLRB case handling forms including computer forms, chronology and facsimile cover sheets, which are not being forwarded at this time because we assume that you do not want this material. In fact, this information constitutes internal trivial administrative material of no genuine public interest and is automatically exempt under Exemption 2, 5 U.S.C. Sec. 552(b)(2). See, e.g. Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992). However, within its discretion, the Agency does disclose such information, after appropriate deletions have been made to protect privacy and confidentiality interests privileged from disclosure by FOIA Exemptions 6, 7(C) and 7(D), as well as information privileged by Exemption 5, if any. If our assumption is incorrect and you do want this material, please make a written request addressed to the Regional Director and the documents, with the appropriate deletions, will be forwarded to you.

You do not request copies of documents previously addressed or copied to you or submitted to the NLRB by you or the law firm representing you during the investigation appeal of this unfair labor practice charge, Dickstein Shapiro Morin & Oshinsky. Similarly, we are not providing copies of documents, in this case file, where it is indicated that they were either sent from or to your counsel in this case, with the understanding that you should already possess these documents. If this understanding is incorrect, please submit a written request for the specific previously furnished records or documents, set forth below, that you wish us to provide.

1. Letter dated 3/21/01 from Director Office of Appeals to your counsel re: acknowledgement of appeal,
2. Letter dated 6/29/01 from Director Office of Appeals to your counsel re: appeal denial.

You request “the FOIA file for this case, showing all requests for information about the case, except for this request.” A search of the Regional office files discloses no documents responsive to this request.

You request all letters, documents, notes, and other material related to this case, including material submitted by American Institute of Physics, its lawyers and third parties, but excluding any documents submitted by you or the law firm of Dickstein Shapiro Morin and Oshinsky. Those portions of the responsive documents that are not exempt are enclosed as follows, with applicable redactions. One copy only is provided of any document found in duplicate.

1. Case Service Sheet dated 1/11/01,
2. Typed statement dated 1/15/01,

3. Letter dated 12/4/00 from Acting Regional Director to Charged Party re: service of charge,
4. Letter dated 12/6/00 from Charged Party Counsel to Board Agent re: representative,
5. Letter dated 1/17/01 from Board Agent to Charged Party Counsel re: allegations,
6. Letter dated 1/18/01 from Charged Party Counsel to Board Agent re: clarification of allegations,
7. Letter dated 1/19/01 from Board Agent to Charged Party Counsel re: clarification of allegations,
8. Letters dated 2/2/01 (re-service) and 1/29/01 from Charged Party Counsel to Board Agent re: position statement w/ attachments.

Exemption 6 permits agencies to withhold information about individuals in “personnel and medical and similar files” where the disclosure of the information “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. 552(b)(6). The “files” requirement covers all information that “applies to a particular individual.” U.S. Dept. of State v. Washington Post Co., 456 U.S. 595, 601-602 (1982). Exemption 6 requires agencies to balance the public’s right to disclosure against the individual right to privacy.

Exemption 7(C) permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Individuals named in a law enforcement investigation, including third parties mentioned in investigatory files, as well as witnesses and informants who provide information during the course of an investigation, have such a privacy interest. See Nation Magazine, Washington Bureau v. U.S. Customs Service, 71 F.3d 885, 894 (D.C.Cir. 1995); Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985). Further, Exemption 7(C) requires the balancing of the individual right to privacy against the public’s right to disclosure.

The kind of public interest involved is information which if disclosed would “shed [] light on an agency’s performance of its statutory duties.” U.S. Dept. of Justice v. Reporters Committee for the Freedom of the Press, 489 U.S. 749, 773 (1989).

The information sought includes the following recognizable privacy interests, such as names, job titles, fax numbers, job performance and personnel actions. You have not satisfied your burden of proof as to the public interest in disclosure. See Carter v. U.S. Dept. of Commerce, 830 F.2d 388, 390-391 n. 8 & 13 (D.C.Cir. 1987). The information sought is therefore exempt from disclosure, in part, under Exemptions 6 and 7(C).

FOIA Exemption 5's attorney work-product privilege protects documents and other memoranda that reveal an attorney's mental impressions and legal theories and that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See Hickman v. Taylor, 329 U.S. 495, 509-510 (1947); U.S. v. Weber Aircraft Corp., 465 U.S. 792 (1984); FTC v. Grolier, Inc., 462 U.S. 19 (1983); U.S. v. Nobles, 422 U.S. 225, 239 n. 13 (1975). Additionally, the protection provided by Exemption 5 of the FOIA for attorney work-product material is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See, FTC v. Grolier, Inc., 462 U.S. at 28 (1983). Further, the protection against disclosure of work-product documents extends even after litigation is terminated and the case for which they were created is closed. Id.

You requested “[a]ll handwritten and typewritten notes and other material written by NLRB staff members. . . .” This request encompasses certain information in the requested investigative file that contains an evaluation and analysis of the critical facts and legal theories governing the case and other similar matter, thereby falling squarely within the protection of Exemption 5's attorney work-product privilege.

The requested information consists of intra-agency notes that would not be available by law to a party in litigation with this Agency. FOIA Exemption 5 has been construed to exempt those documents normally privileged in the civil discovery context. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). It is designed to protect and promote the objectives of fostering frank deliberation and consultation within the Agency in the predecisional stage, and to prevent a premature disclosure that could disrupt and harm the Agency's decision-making process. See, NLRB v. Sears, Roebuck & Co., 421 U.S. at 150-151, 152. The protected status of a predecisional document is not altered by the subsequent issuance of a decision, by the agency opting not to make a decision or by the passage of time. See, e.g., Wolfe v. HHS, 839 F.2d 768, 776 (D.C. Cir. 1988) (en banc); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 13 (D.D.C. 1995), aff'd, 76 F.3d 1232 (D.C. Cir. 1996).

Your request for all “notes and other material written by NLRB staff members” encompasses certain information in the requested investigative file that was prepared in order to assist the agency decision makers in arriving at their decision and formed a part of the agency's deliberative process in making such a decision.

FOIA – American Institute of Physics 5-CA-29366
May 11, 2004
Page Five

For the purpose of assessing fees, we have placed you in Category 1, as a commercial use requester. The charges associated with this FOIA request are as follows:

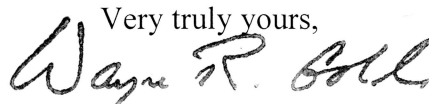
Clerical time (0.5 hours @ \$3.10 per ¼ hour)	\$ 6.20
Professional time (3 hours @ \$9.25 per ¼ hour)	\$ 111.00
Copying charges (27 pgs. @ 12cents per page)	<u>\$ 3.24</u>

TOTAL **\$ 120.44**

Please make a check in this amount payable to the “National Labor Relations Board” and send it to the following address:

National Labor Relations Board,
Finance Section,
Attention FOIA Processing,
1099 14th Street, N.W., Room 7828,
Washington, D.C. 20570.

The undersigned is responsible for the above determination. You may obtain a review thereof under the provisions of the NLRB’s Rules and Regulations, 29 C.F.R. 102.117 (c)(2)(ii) by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D.C., 20570, within 20 days (excluding Saturdays, Sundays and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Very truly yours,

Wayne R. Gold,
Regional Director

Enclosures

Case Service Sheet**As of 1/11/2001****Case Number:** 05-CA-29366-001**Case Name:** American Institut of Physics

<u>Charged Party #1 Party:</u> American Institute of Physics 1 Physics Ellipse College Park, MD	<u>Point of Contact:</u> Mr. Marc H. Brodsky Phone: (301)209-3100 Fax:
<u>Charged Party #1 Legal Representative #1:</u> Jackson, Lewis, Schnitzler & Krupman 1000 Woodbury Road, Suite 402 Woodbury, NY 11197	<u>Point of Contact:</u> Mr. Mark L. Sussman Phone: (516)364-0404 Fax: (516)364-0466
<u>Charging Party #1 Party:</u> 3003 Van Ness St., NW Washington, DC 20008	<u>Point of Contact:</u> Mr. Jeff Schmidt Phone: (202)537-3645 Fax:

STATEMENT BY [REDACTED]

This statement is being sent by fax on 15 January 2001 to Thomas McCarthy of the National Labor Relations Board, Region 5, Washington Resident Office, 1099 14th Street NW, Room 5530, Washington, DC 20570.

*Exempting
b2, 7(c)*

On 29 August 2000, I received a phone call from [REDACTED] at Physics Today magazine. [REDACTED] and I are [REDACTED] having worked together for several years at Physics Today. [REDACTED] and [REDACTED] is in the habit of giving me periodic updates about the magazine. This phone call concerned an emergency meeting convened earlier that day by [REDACTED]. According to [REDACTED] told the assembled [REDACTED] that [REDACTED] had "harassed" someone who had applied for an editorial job at Physics Today. The applicant had then complained to someone at AIP, the staff was told. As best I can recall, [REDACTED] then said, according to [REDACTED] that information about job searches is confidential and should not be shared with people outside the magazine, and that performance reviews also should not be discussed with others. [REDACTED] was extremely upset when we talked, as [REDACTED] felt [REDACTED] remarks had been aimed at [REDACTED] being that [REDACTED] is still on friendly terms with [REDACTED] feared that [REDACTED] would find some way to [REDACTED]

At the time, my reaction had been to dismiss the possibility of retaliation. I knew that [REDACTED] was monitoring the company's hiring practices, and that it was highly unlikely that [REDACTED] had harassed the applicant. It seemed far more likely that the applicant had simply mentioned to someone at AIP that [REDACTED] had been contacted by [REDACTED]. [REDACTED] grew concerned about speaking with [REDACTED]. [REDACTED] were exaggerating the situation to turn staff sentiment against [REDACTED].

Although I still think that is what happened, I was wrong to believe that [REDACTED] for [REDACTED] connection to [REDACTED]. In the months since the August meeting, [REDACTED] has subjected [REDACTED] work to closer and more critical scrutiny, to the point where [REDACTED] recently confronted [REDACTED] about it. [REDACTED] told me that [REDACTED] admitted that [REDACTED] was [REDACTED] more carefully these days. When [REDACTED] asked why, [REDACTED] said, "Because I have the time." When [REDACTED] complained that [REDACTED] remarks were often off-putting, [REDACTED] replied, "I don't have the time to be diplomatic."

As an aside, I must say that the changes [REDACTED] insists [REDACTED] make to [REDACTED] news stories often do nothing to improve them and in many cases actually make them worse. [REDACTED] occasionally seeks my advice when [REDACTED] has received such a directive from [REDACTED] to see

[REDACTED] if I can think of some way that [REDACTED] can appease [REDACTED] without damaging [REDACTED] work. Many of [REDACTED] comments seem almost designed to irritate.

[REDACTED] also recently told me that [REDACTED] has been discussing with [REDACTED] the possibility of [REDACTED] taking over the "Physics Community" section of the magazine. Until now, [REDACTED] have been [REDACTED] for producing the section. If [REDACTED] does take over the section, it effectively will be a [REDACTED] who not only is an experienced and capable journalist but [REDACTED]

On 10 January 2001, I called [REDACTED] to confirm that my recollection of our phone conversation in August was the same as [REDACTED] agreed with my description of the conversation, except that [REDACTED] could not remember whether or not [REDACTED] had mentioned performance reviews.

[REDACTED]



United States Government

NATIONAL LABOR RELATIONS BOARD

Region 5

103 South Gay Street, 8th Floor

Baltimore, MD 21202-4061

Telephone: (410) 962-2822

Facsimile: (410) 962-2198

December 4, 2000

American Institute of Physics
Mr. Marc H. Brodsky
1 Physics Ellipse
College Park, MD

Re: Case 5-CA-29366-1

Gentlemen:

This is to inform you that a charge, a true copy of which is enclosed, was filed in the above-entitled matter. Also enclosed is a copy of Form NLRB-4541 pertaining to our investigation and voluntary adjustment procedures.

For information pertaining to this case, please contact Thomas P. McCarthy, 202-501-8659. When the Board agent solicits relevant evidence from you or your counsel, I request and strongly urge you or your counsel to promptly present to the Board agent any and all evidence relevant to the investigation. It is my view that a refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily. Full and complete cooperation includes, where relevant, timely providing all material witnesses under your control to a Board agent so that witnesses' statements can be reduced to affidavit form, and providing all relevant documentary evidence requested by the Board agent. The submission of a position letter or memorandum, or the submission of affidavits not taken by a Board agent, does not constitute full and complete cooperation. Further, any position letter will be treated as binding upon the party submitting it, and may be introduced in any hearing as evidence of party positions. Thus, a position letter, if submitted, that seeks to limit its use (for example – restricting its use to the investigative stage of the unfair labor practice charge) will not be accepted and will not constitute cooperation by the party submitting it. The Federal Records Act mandates that records or their copies amassed during an investigation and used in furtherance of our mission are to be retained for a number of years. Additionally, such documents may be disclosable under a request pursuant to the Freedom of Information Act. Further, please be advised that we cannot accept any limitations on the use of any evidence or position statements that are provided to the Agency. Thus any claim of confidentiality cannot be honored except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. In this regard, we are required by the Federal Records Act to keep copies of documents used in furtherance of our investigation for some period of years after a case closes. Further, we may be required by the Freedom of Information Act to disclose such records upon request, absent some applicable exemption such as those that protect confidential financial information or personal privacy interests (e.g., Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4)). Accordingly, we will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the foregoing laws, regulations and policies. Please state the case name and number on all correspondence.

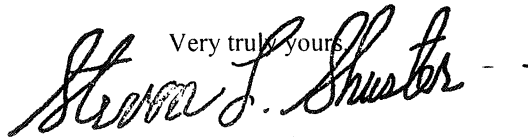
Enclosed for the Employer is a form requesting commerce data which should be completed, signed by an employer representative and returned in the enclosed envelope addressed to my attention.

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the courts. If you choose to have a representative appear on your behalf, please complete Form NLRB-4813 which may be used if you choose to have your agent receive exclusive service of all documents and communications, except those expressly excluded. Please note that Form NLRB-4701 may be executed by your designated representative, but that Form NLRB-4813 will not be honored unless it is signed by you as a party.

December 4, 2000

Please be advised that, under the Freedom of Information Act, unfair labor practice charges and representation petitions are subject to prompt disclosure to members of the public upon request. In this regard, you may have received a solicitation by organizations or persons who have obtained public information concerning this matter and who seek to represent you before our Agency. You may be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board; their information regarding this matter is only that which must be made available to any member of the public.

Customer service standards concerning the processing of unfair labor practice cases have been published by the Agency and are available upon request from the Regional Office. Your cooperation in this matter is invited so that all facts of the case may be considered.

Very truly yours,


Steven L. Shuster
Acting Regional Director

Enclosures

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December 6, 2000

VIA FACSIMILE 410-962-2198
and REGULAR MAIL

Thomas P. McCarthy, Esq.
National Labor Relations Board
Region 5
103 South Gay Street - 8th Floor
Baltimore, Maryland 21202-4061

Re: American Institute of Physics
Case No. 5-CA-29366-01

Dear Ms. McCarthy:

This letter confirms our telephone conversation today in which I told you that we represent American Institute of Physics and that Mark L. Sussman will be handling this case. Please direct all future correspondence and communications to Mr. Sussman's attention.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN



Alan C. Becker

ACB:kf
Enc



United States Government

NATIONAL LABOR RELATIONS BOARD

Resident Office - Region 5

1099 14th Street, NW - Suite 5530

Washington, DC 20570-0001

January 17, 2001

*Exemption
b 2 7 (c)*

VIA FACSIMILE TRANSMISSION (516) 364-0466 AND FIRST CLASS MAIL

Mr. Mark L. Sussman, Esq.
Jackson Lewis Schnitzler & Krupman
1000 Woodbury Road, Suite 402
Woodbury, New York 11797

American Institute of Physics
Cases 5-CA-29366

Dear Mr. Sussman:

The Region has received your December 6, 2000 letter of representation in this matter. The Region has reviewed evidence provided by the Charging Party. I set forth below allegations that warrant further investigation and the evidence that I need from the Employer to complete the investigation in this matter.

The original 8(a)(1) charge was filed by Charging Party, Jeff Schmidt, on November 28, 2000 and served [REDACTED] on the Employer on November 28, 2000. It alleges that on May 31, 2000, the Employer, by its officers, agents, and supervisors, discharged Mr. Schmidt in retaliation for protected, concerted activity.

The first amended charge was filed by Mr. Schmidt on January 3, 2001. It alleges that on May 31, 2000, the Employer, by its officers, agents, and supervisors, discharged Mr. Schmidt in retaliation for protected, concerted activity and because he advocated formation of a union at the workplace in violation of Section 8(a)(3) and (1) of the Act. It further alleges that on August 29, 2000 the Employer promulgated a rule prohibiting employees from discussing their performance appraisals in violation of Section 8(a)(1).

As a result of the investigation of Charging Party's evidence, it is alleged as follows. Since March 1981, [REDACTED] was employed as a physics [REDACTED] with Physics Today (PT) magazine, a Division of the American Institute of Physics (AIP). [REDACTED] was [REDACTED] on May 31, 2000. At the time of [REDACTED] immediate supervisor was [REDACTED] of Physics Today magazine. [REDACTED] boss is [REDACTED] of Physics Today. [REDACTED] predecessor, [REDACTED] was [REDACTED] about March 2, 1999. [REDACTED] boss is [REDACTED] for AIP. [REDACTED]

boss is [REDACTED] of the American Institute of Physics. The American Institute of Physics has approximately 500 employees. [REDACTED] at AIP.

On May 31, 2000, [REDACTED] told [REDACTED] that [REDACTED] wanted to meet with them. Thereafter, [REDACTED] escorted [REDACTED] to the personnel office. [REDACTED] joined them in a small conference room. [REDACTED] said, we see in [REDACTED] introduction to [REDACTED] book that [REDACTED] have stolen from the magazine. Therefore, [REDACTED] can [REDACTED] by Physics Today. [REDACTED] said [REDACTED] employment is [REDACTED] now. [REDACTED] objected and denied the accusation. [REDACTED] said, we are not here to answer questions. [REDACTED] said we are not going to talk about this today. [REDACTED] said that [REDACTED] would not be allowed to go back to [REDACTED] office and would not be allowed to come back into the building at any time for any reason. Thereafter, [REDACTED] was escorted from the building. [REDACTED] alleges that [REDACTED] use of office time was consistent with what management allows and with the office culture that management maintains. [REDACTED] claims that [REDACTED] was not paid for certain vacation time, personal days and bonus days.

[REDACTED] tells the Region that [REDACTED] would not have been [REDACTED] had [REDACTED] not engaged in workplace activism with co-workers to improve terms and conditions of employment and had [REDACTED] not advocated formation of a union at the workplace. To support this claim, [REDACTED] alleges the following.

On November 15, 1996, [REDACTED] and co-workers gave PT's [REDACTED] a ten-point list of changes that they wanted to be made at the PT workplace. They presented their requests in the form of a proposed agenda for a two-day retreat scheduled for November 19-20, 1996. That agenda included job security, staff involvement in workplace dispute resolution, better distribution of job tasks, a change in hiring practices to increase diversity of the staff, and the provision of appropriate conditions of employment for professionals.

On September 18, 1997, a majority of the PT staff, led by [REDACTED] gave [REDACTED] a list of concerns to improve working conditions for professionals. They presented their concerns as a request for agenda time at a one-day retreat scheduled for September 25, 1997. On September 22, 1997, on behalf of [REDACTED] asked then PT [REDACTED] to include the support staff in the September 25, 1997 retreat. On September 25, 1997, near the beginning of the staff retreat, [REDACTED] asked if staff members could ask questions. [REDACTED] shouted no, that's an order. A few days after the retreat, [REDACTED] told [REDACTED] that [REDACTED] thought that [REDACTED] request for the right to ask questions was a disguised attempt to raise issues of staff concern.

On October 1, 1997, [REDACTED] gave [REDACTED] a written "gag order." [REDACTED] told [REDACTED] that [REDACTED] "interruption" at the retreat was "destructive and counterproductive" and that continuation of such behavior in the office or at any work-related activity will not be tolerated. The notice stated that it was to be treated as confidential, i.e., that [REDACTED] could not discuss it with co-workers. Shortly thereafter, [REDACTED] was given a similar gag order and warned about speaking up during staff meetings. On October 17,

1997, [REDACTED] and co-workers, in a written grievance presented to the PT/[REDACTED] at its annual meeting, requested relief from what they perceived as an increasingly repressive work environment at the magazine. The grievance describes how [REDACTED] had been warned about speaking up regarding workplace problems. The grievance states, "Both [REDACTED] have been outspoken about problems that many of us see at the magazine. We feel that the [gag orders on them] contribute to a repressive atmosphere at the magazine and restrict all of us. We hope the [REDACTED] will do whatever it can to get these warnings retracted, and to remind the PT/[REDACTED] that repression is counterproductive. Such steps would go along way toward diminishing the fear that [REDACTED] now associate with trying to openly address problems at the magazine." In addition to this written presentation, [REDACTED] and co-workers also orally presented collective grievances to the [REDACTED] during private individual meetings. On December 2, 1997, [REDACTED] rescinded the gag orders on [REDACTED]

On January 22, 1998, [REDACTED] asked [REDACTED] not to reduce support-staff help as had been discussed at prior staff meetings. [REDACTED] indicated that [REDACTED] was not inclined to give the request much consideration because of [REDACTED] workplace activity.

On January 28, 1998, after working hours, [REDACTED] broke up two private conversations between [REDACTED] and a co-worker. After breaking up the second conversation, [REDACTED] told them that [REDACTED] was forbidding all private conversations between [REDACTED] at work because of the workplace activity that had taken place during the last year. Shortly after January 28, 1998, [REDACTED] told an employee that [REDACTED] was 100 percent sure that the activity that [REDACTED] had broken up between [REDACTED] and a co-worker involved [REDACTED] organizing against management's effort to shift clerical work from the secretarial staff to the editors.

On March 20, 1998, [REDACTED] told [REDACTED] that some of [REDACTED] workplace activities were counterproductive.

On March 24, 1998, [REDACTED] met with [REDACTED] to discuss [REDACTED] 1998 performance review. During this review, [REDACTED] condemned [REDACTED] workplace activities with co-workers and focused in particular on [Schmidt's] leading role at the November 1996 retreat, where [REDACTED] had proposed an agenda to address job security and working conditions. [REDACTED]

[REDACTED] In addition, [REDACTED] increased [REDACTED] workload from 14 feature articles per year to 18 feature articles per year, a 28 percent increase.

On April 27, 1998, [REDACTED] wrote [REDACTED] 1998 performance review. [REDACTED] circulated [REDACTED] appeal to co-workers. That [REDACTED] details management's hostility toward concerted activity in the workplace. On June 25, 1998, [REDACTED] met with [REDACTED] concerning [REDACTED] 1998 performance review. [REDACTED] made it clear to [REDACTED] that [REDACTED] workplace activism, apart from [REDACTED] job assignments, played a central role in [REDACTED] performance review and [REDACTED] job performance rating.

From mid-December 1998 to mid-June 1999, [REDACTED] took a six-month unpaid leave of absence. Upon [REDACTED] return from unpaid leave in mid-June 1999, [REDACTED] criticized [REDACTED] for circulating [REDACTED] 1998 performance review [REDACTED] among co-workers.

On August 17, 1999, [REDACTED] received a 1999 performance review covering the period from February 1998 to August 1999. The review states, inter alia, "During this review period, [REDACTED]

[REDACTED] of Physics Today. [REDACTED] An example of such behavior, according to the review, was showing co-workers [REDACTED] 1998 performance review [REDACTED] Schmidt alleges that the 1999 performance review [REDACTED] for communication with co-workers about workplace issues.

In mid-August 1999, [REDACTED] held discussions with a number of co-workers to organize support for the right of employees to discuss performance reviews and other workplace issues with each other and to discuss [REDACTED] actions by management against employees. On August 19, 1999, [REDACTED] met with [REDACTED] to discuss [REDACTED] 1999 performance review. [REDACTED] communications with co-workers concerning workplace issues. [REDACTED] demanded that [REDACTED] tell [REDACTED] which co-workers [REDACTED] had spoken with about issues raised in [REDACTED] 1999 performance review.

On August 26, 1999, [REDACTED] informed [REDACTED] that [REDACTED] and [REDACTED] had decided not to reveal any names or any information that would identify which [REDACTED] were involved in private discussions about workplace issues. During this conversation, [REDACTED] reiterated [REDACTED] opposition to private conversations between [REDACTED] about workplace issues. [REDACTED] told [REDACTED] that everything to do with the job was [REDACTED] domain and that nothing should be kept from [REDACTED]

On November 10, 1999, [REDACTED] requested that [REDACTED] excess vacation time be carried over to 2000. [REDACTED] request was denied, with minor exception. [REDACTED] identical request was granted.

During the week of May 22, 2000, an article about [REDACTED] book that had been written in *The Chronicle of Higher Education* was circulating in the workplace. The article says, among other things, that [REDACTED] advocated that salaried professionals form unions in their workplaces.

On May 30, 2000, [REDACTED] distributed a positive review of [REDACTED] book to all Physics Today [REDACTED] As noted, on May 31, 2000, [REDACTED]

On August 29, 2000, [REDACTED] called a special staff meeting and told [REDACTED] not to discuss their performance reviews with anyone.

In light of the foregoing, by close of business Thursday, January 31, 2001, at a time and location that is mutually convenient, I would like to take sworn affidavits from

[REDACTED] and from any other witnesses that you believe has evidence relevant to the investigation of the above-captioned matters. Please be advised if AIP refuses to allow me to take sworn affidavits from said witnesses, such refusal will be considered to constitute less than full and complete cooperation with Region 5's investigation of these matters. Be advised that the submission of position statements or memoranda, or the submission of affidavits that have not been taken by a Board agent, does not constitute full and complete cooperation with the Region's investigation.

In addition to the presentation of witnesses mentioned above, please submit to by close of business on **Thursday, January 31, 2001** any other evidence that your client wishes to provide in this matter. Absent submission of Employer evidence by that date, I will make my recommendation to the Regional Director based solely on the evidence contained in the file.

Please contact me if you have any questions. My telephone-number is [REDACTED] and my facsimile number is [REDACTED]

Very truly yours,

Thomas P. McCarthy

Thomas P. McCarthy
Field Attorney

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January 18, 2001

VIA FACSIMILE (202) 208-3013

Thomas P. McCarthy
National Labor Relations Board
Resident Office - Region 5
1099 14th Street, NW
Suite 5530
Washington, D.C. 20570-0001

Re: American Institute of Physics

Dear Mr. McCarthy:

As you know, we represent American Institute of Physics ("AIP"). In your January 17, 2001 letter, there are several statements that need clarification. I would appreciate your response to the questions listed below, as soon as possible, so that we can meet the deadline you imposed in your letter.

1. In your letter you state that [REDACTED] has alleged that [REDACTED] "use of time was consistent with what management allows and with the office culture that management maintains." Since AIP is unaware of any employee who has been permitted to use work time for [REDACTED] personal pursuits, we request that you provide us the specifics of this allegation. We would request that you provide us with the names, times and dates and the personal pursuit engaged in by other employees at AIP.

2. The amended charge states that [REDACTED] due to [REDACTED] attempt to form a union at AIP. Does this allegation refer to anything other than the May 22 article in The Chronicle of Higher Education. If not, please specify when [REDACTED] allegedly advocated the formation of a union at AIP and the specific conduct [REDACTED] allegedly engaged in.

*Exemption
6 + 7(c)*

Thomas P. McCarthy
National Labor Relations Board

January 18, 2001
Page 2

3. In the amended charge, [REDACTED] alleges that on August 29, 2000 AIP announced a rule "prohibiting [REDACTED] from discussing their reviews with other [REDACTED]" Please provide us with a copy of the "rule," since it is AIP's position that no such rule exists.

4. In your letter you state that [REDACTED] alleges that [REDACTED] was "not paid for certain vacation time, personal days and bonus days." Please provide us with the specifics of [REDACTED] claim, including the number and type of days [REDACTED] allegedly was not paid for, the year in which they were earned and when [REDACTED] allegedly was denied payment. We also request an explanation regarding how this claim is related to [REDACTED] charge and amended charge.

5. In your letter you state that if AIP does not permit you to take sworn affidavits from at least [REDACTED] "such refusal will be considered to constitute less than full and complete cooperation with Region 5's investigation of these matters." Please provide us with the statutory, regulatory or case law citation, for the definition of "full cooperation" as you have defined it in your letter. Please also tell us what the implications and consequences are for providing "less than full cooperation," as defined in your letter.

As I previously stated, we request that you provide us with the answers to the questions in this letter as soon as possible, so that we may timely file our response by the January 31, 2001 deadline.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN


Alan C. Becker

ACB:kf
Enc

cc:

[REDACTED]
Mark L. Sussman, Esq.

[REDACTED] Lt McCarthy enc questions.wpd



United States Government
NATIONAL LABOR RELATIONS BOARD
Region 5 – Washington Resident Office
1099 14th Street, NW, Suite 5530
Washington, DC 20570

January 19, 2001

VIA FACSIMILE TRANSMISSION (516) 364-0466 AND FIRST CLASS MAIL

Mr. Alan Becker, Esq.
Jackson Lewis Schnitzler & Krupman
1000 Woodbury Road, Suite 402
Woodbury, New York 11797

*Exemption
6 + 7 (2)*

American Institute of Physics
Cases 5-CA-29366

Dear Mr. Becker:

I am in receipt of your January 18, 2001 letter. You assert that several statements in my January 17, 2001 letter need clarification. My responses are numbered below.

1. I do not have specific names, times and dates when other employees used work time for personal pursuits.
2. The 8(a)(3) allegation does not refer to anything other than the article.
3. I have no copy of the rule.
4. On or about November 10, 1999, [REDACTED] requested that accumulated vacation time be carried over to year 2000. [REDACTED] request was denied. When [REDACTED] claims that [REDACTED] was not paid for this forfeited vacation time. [REDACTED] also claims that [REDACTED] was paid for only two of the four personal days and bonus days due [REDACTED]. This issue concerns fair treatment and potential backpay.
5. Region 5 gives less weight to Position Statements than sworn affidavits that are given to a Board agent under oath.

Please contact me if you are in need of any further clarification.

Very truly yours,

Thomas P. McCarthy
Thomas P. McCarthy
Field Attorney

JACKSON LEWIS SCHNITZLER & KRUPMAN

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February 2, 2001

VIA FACSIMILIE (202-208-3013)

Thomas P. McCarthy, Esq.
Field Attorney
National Labor Relations Board
Region 5
103 South Bay Street - 8th Floor
Baltimore, Maryland 21202-4061

*Exempted
6-27-01*

Re: American Institute of Physics
Case No. 5-CA-29366

Dear Mr. McCarthy:

As I mentioned, the enclosed position statement was sent via Federal Express on January 29th. I understand you have not received it and are therefore sending you a second copy via facsimile.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN

Mark L. Sussman
Mark L. Sussman

MLS/gm

cc: Alan C. Becker

[REDACTED] Correspondence\2-2-01 Ltr to McCarthy fax position statmt. wpd

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January 29, 2001

VIA FEDERAL EXPRESS

Thomas P. McCarthy, Esq.
Field Attorney
National Labor Relations Board
Region 5
103 South Bay Street - 8th Floor
Baltimore, Maryland 21202-4061

*Exempted
6-7 (c)*

Re: American Institute of Physics
Case No. 5-CA-29366

Dear Mr. McCarthy:

We represent American Institute of Physics ("AIP") in the above-referenced case. This letter, and the attached exhibits, respond to the charge and amended charge filed by AIP's [REDACTED] Jeff Schmidt ("Schmidt") and demonstrates that AIP [REDACTED] for legitimate, non-discriminatory reasons. [REDACTED] caused [REDACTED] by [REDACTED] admission that [REDACTED] "stole" time from AIP to write an almost 300 page book. In these circumstances, [REDACTED] charge should be dismissed in its entirety. No employee is entitled to use work time for [REDACTED] private pursuits, instead of doing the job [REDACTED] is being paid to do. [REDACTED] characterization of [REDACTED] actions as stealing is accurate. [REDACTED] stole work time and productivity from AIP.

I. MOST OF [REDACTED] ALLEGATIONS ARE BARRED BY THE SIX MONTH
STATUTE OF LIMITATIONS CONTAINED IN SECTION 10(b) OF THE ACT.

Section 10(b) of the Act states in pertinent part that:

*... no complaint shall issue based on any unfair
labor practice occurring more than six months prior
to the filing of the charge with the Board. ...*

In your January 17, 2001 letter to Mark Sussman, Esq., you set forth [REDACTED] allegations. Aside from [REDACTED] on May 31, 2000 and an alleged meeting regarding

performance reviews on August 29, 2000, all of [REDACTED] allegations occurred more than six months prior to November 28, 2000 -- the date [REDACTED] allegedly filed the unfair labor practice charge. In these circumstances, all of the allegations set forth from the fourth paragraph on the first page of your letter through the fifth paragraph on page 4 of your letter, are outside the six-month statute of limitations contained in Section 10(b). Therefore, no response to these time-barred allegations is necessary. 1/

II. AIP [REDACTED] BECAUSE [REDACTED] ADMITTEDLY "STOLE"
FROM [REDACTED] EMPLOYER.

A. [REDACTED] For Legitimate Non-Discriminatory Reasons.

The American Institute of Physics is a not-for profit membership corporation chartered in 1931 for the purpose of promoting the advancement of the knowledge of physics. Its members are comprised of leading societies in the fields of physics and related sciences. AIP publishes scientific journals, including the magazine *Physics Today*. *Physics Today* ("PT") is a scientific journal which solicits feature articles from experts in the field of physics. After an article is drafted, the draft is reviewed by PT's editorial staff. Thereafter, the article is sent to an outside expert for peer review. After peer review is completed, a PT staff editor develops a strategy for the author to make revisions. After the author revises the article, the article, which is now in its "ready to edit" stage, is returned to PT for editing by a staff editor.

[REDACTED] worked for PT as an [REDACTED] from 1981 to May 31, 2000. [REDACTED] was [REDACTED] direct supervisor from in or around September 1994, until the time of [REDACTED]. As an [REDACTED] [REDACTED] was responsible for editing a defined number of feature articles per year. [REDACTED] responsibilities included working on both "ready to edit" articles and those in the pre "ready to edit" stage.

In or around the latter part of May, 2000, AIP learned that [REDACTED] had written a book. [REDACTED] AIP's [REDACTED] read a review of [REDACTED] book, which contains [REDACTED] statement that [REDACTED] had written the book on "stolen" time. Since no one in management at AIP knew [REDACTED] was writing or had written a book, [REDACTED] obtained a copy of the book and read some of the book's INTRODUCTION to see if the review of the book accurately quoted [REDACTED]. Unfortunately it did. In the INTRODUCTION [REDACTED] announced unequivocally that:

*This book is stolen. Written in part on stolen time,
that is. I felt I had no choice but to do it that way.*

1/ By not responding to the time barred allegations, AIP does not concede that the allegations are true. These time-barred allegations are meritless and are completely irrelevant to the legitimate reasons for [REDACTED]

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Like millions of others who work for a living, I was giving most of my prime time to my employer. My job simply didn't leave me enough energy for a major project of my own, and no one was about to hire me to pursue my own vision. . .

* * *

So I began spending some office time on my own book. . .

Emphasis added (Exhibit 1).

[REDACTED] INTRODUCTION admits that [REDACTED] took AIP's money, used its facilities and its time to write a book. Prior to [REDACTED] disclosure, AIP had experienced an ongoing issue with the lack of production by [REDACTED]. Accordingly, when AIP learned, late in May 2000, that [REDACTED] admitted to using work time to write a non-work related book, rather than using AIP's time to achieve [REDACTED] productivity goals, [REDACTED] employment was [REDACTED]. In addition, [REDACTED] statement that [REDACTED] wrote [REDACTED] book on stolen Company time flew in the face of AIP's efforts to have employees meet productivity goals.

Clearly, AIP had a legitimate reason to [REDACTED]

B. Even if The Region Were To Consider [REDACTED] Time-Barred Allegations, [REDACTED] was Proper.

We assume that you included [REDACTED] time barred allegations in your January 17, 2000, letter to demonstrate that there are allegations that AIP had some animus toward [REDACTED] alleged concerted protected activities. As demonstrated below, [REDACTED] time barred allegations are irrelevant to [REDACTED]

In October 1998, [REDACTED] requested a six month sabbatical (Exhibit 2). AIP granted [REDACTED] request (Exhibit 3). [REDACTED] took [REDACTED] sabbatical from December 14, 1998 to May 11, 1999. On June 29, 1999, [REDACTED] requested that [REDACTED] be allowed to work part-time. Specifically, [REDACTED] proposed that [REDACTED] be allowed to work two-thirds time for two-thirds pay (Exhibit 4). AIP also granted this request. In these circumstances, there can be no inference of animus toward [REDACTED] regarding [REDACTED] allegations of earlier conduct by AIP.

Even if the Region considers [REDACTED] time barred allegations, in conjunction with the grounds for [REDACTED] charge should be dismissed. In Wright Line, 251 NLRB 1083

JACKSON LEWIS SCHNITZLER & KRUPMAN

(1980), the NLRB set forth the test to apply in a dual-motive case.^{2/} The Wright Line test requires that AIP show that it would have taken the same action in absence of [REDACTED] alleged protected concerted activity. 251 NLRB at 1089.

[REDACTED] statement in [REDACTED] book that [REDACTED] stole time from AIP and wrote [REDACTED] book on Company time, instead of doing [REDACTED] job, and meeting [REDACTED] productivity goals, as other employees were expected to do, is a legitimate reason for [REDACTED]. Under Wright Line, it is clear that AIP would have [REDACTED] even in the absence of any alleged protected concerted activity and the charge and the amended charge should be dismissed in its entirety.^{3/}

Given the time constraints that you have imposed and the fact that you have not responded to our January 18, 2001 letter, AIP reserves the right to amend this position statement and submit additional evidence if necessary.

For all the foregoing reasons, the charge and amended charge should be dismissed.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN


Alan C. Becker

ACB:kf
Enc

cc: [REDACTED]

^{2/} We do not concede that this case is a "dual motive" case. However, even under the NLRB's Wright Line test, the complaint should be dismissed.

^{3/} The only other allegation that is not time-barred is [REDACTED] allegation that on August 29, 2000, AIP purportedly held a meeting to tell employees not to discuss their performance reviews. AIP unequivocally denies this allegation. Moreover, since August 29 is three months after [REDACTED] this allegation obviously could not be relevant to the reason for [REDACTED]

JACKSON LEWIS SCHNITZLER & KRUPMAN

EXHIBIT 1

INTRODUCTION

This book is stolen. Written in part on stolen time, that is. I felt I had no choice but to do it that way. Like millions of others who work for a living. I was giving most of my prime time to my employer. My job simply didn't leave me enough energy for a major project of my own, and no one was about to hire me to pursue my own vision, especially given my irreverent attitude toward employers. I was working in New York City as an editor at a glossy science magazine, but my job, like most professional jobs, was not intellectually challenging and allowed only the most constrained creativity. I knew that if I were not contending with real intellectual challenges and exercising real creativity—and if I were not doing anything to shape the world according to my own ideals—life would be unsatisfying, not to mention stressful and unexciting. The thought of just accepting my situation seemed insane. So I began spending some office time on my own work, dumped my TV to reappropriate some of my time at home, and wrote this book. Not coincidentally, it is about professionals, their role in society, and the hidden battle over personal identity that rages in professional education and employment.

The predicament I was in will sound painfully familiar to many professionals. Indeed, generally speaking, professionals today are not happy campers. After years of worshipping work, many seemingly successful professionals are disheartened and burned out, not because of their 70-hour workweeks, but because their salaries are all they have to show for their life-consuming efforts. They long for psychic rewards, but their employers' emphasis on control and the bottom line is giving them only increased workloads, closer scrutiny by management and unprecedented anxiety about job security. In this way the cold reality of employer priorities has led to personal crises for many of this country's 21 million professionals.

Burned-out professionals may not be immediately obvious to the casual observer, because typically they stay on the job and maintain their usual high level of output. But they feel like they are just going through the motions. They have less genuine curiosity about their work, feel less motivated to do it and get less

EXHIBIT 2

15 September 1998

To: [REDACTED]

From: [REDACTED]

[REDACTED] --

I would like to take a half-year unpaid sabbatical and then return to my job. The sabbatical would begin after I complete my work for the November 1998 issue, after I edit an article for an issue beyond November and once we have provided a means to cover my workload in my absence.

[REDACTED]

EXHIBIT 3

INTER-OFFICE MEMORANDUM

TO:

[REDACTED]

FROM:

EXTENSION: 3102

DATE:

20 November 1998

SUBJECT:

Leave for [REDACTED] [REDACTED]

After 17 years with AIP, [REDACTED] would like to take a six-month "sabbatical" leave. From 14-31 December 1998, [REDACTED] will be on vacation, and from 1 January to 11 May, [REDACTED] will be on leave without pay. Upon [REDACTED] return, [REDACTED] will assume [REDACTED] regular responsibilities with the magazine. During [REDACTED] absence, [REDACTED] editing duties will be covered by cottage employees and independent contractors.

[REDACTED]

EXHIBIT 4

29 June 1999

[REDACTED]

I would like to work on a part-time basis. I would do 2/3 of the work for 2/3 of the salary.

This would solve the workload issue that you have raised, both within the new framework that you have asserted and within my capabilities (after all these years, at my age, I am not prepared to take on additional work). I would be happy to discuss this with you when you return from the July 4 holiday; I'll ask [REDACTED] to let me know when you would like to meet.

[REDACTED]